TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 268.

JUSTUS F. DRESSER, PLAINTIFF IN ERROR,

vs.

THE MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED SEPTEMBER 26, 1874.

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1 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room, in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Monday of May, it being the 11th day of May, A. D. 1874, before the Hon. James M. Love, United States district judge for said district of Iowa.

2

3 Be it remembered that heretofore, to wit, on the 14th day of April, 1873, Justus F. Dresser, by his attys., Mess. Grant & Smith, filed in the clerk's office of the circuit court of the United States for the district of Iowa his præcipe for a summons against The Missouri & Iowa Railway Construction Company; which said præcipe is in words and figures following, to wit:

Circuit court of the United States for the district of Iowa, May term, 1873.

JUSTUS F. DRESSER, CITIZEN OF THE STATE of Illinois,
vs.
THE MISSOURI & IOWA RAILWAY CONSTRUCTION Company, citizen of the State of Iowa.

The clerk will issue a summons or notice in this cause in assumpsit, damages $12,000.

(Signed) GRANT & SMITH &
GEO. F. WAIT,
Attys. for Plaintiff.

(Endorsed:) Filed April 14, 1873. George B. Corkhill, clerk.

4 And thereupon there was issued from said clerk's office a summons against said Missouri & Iowa Railway Construction Company, which said summons is in words and figures following, to wit:

5 *Summons, U. S. C. C.*

UNITED STATES OF AMERICA,
District of Iowa:

To the marshal of the district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon The Missouri and Iowa Railway Construction Company, a citizen of the State of Iowa, to appear before the honorable circuit court of the United States in and for the district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines on the second Monday of May next, it being the 12 day of May, A. D. 1873, then and there to answer unto Justus F. Dresser, a citizen of the State of Illinois, in a plea of assumpsit to the damage of said plaintiff in the sum of twelve thousand dollars. Hereof fail not, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of Des Moines, this the 14th day

of April, A. D. 1873, and of the Independence of the United States the ninety-seventh.

[L. S.] (Signed) GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, District of Iowa.

6 And afterwards, to wit, on the 29th day of April, 1873, said summons was returned by the marshal of said district and filed in said clerk's office, with his return of service endorsed thereon, which said return is in words and figures following, to wit:

7 (Endorsed:) No. 1581. Summons. Circuit court of the United States, district of Iowa. Justus F. Dresser vs. Missouri & Iowa Railway Construction Co. Filed April 29, 1873. George B. Corkhill, clerk. , attorney for plaintiff. Residence, .

This writ came into my hands for service on the 16th day of April, A. D. 1873, and I served the same on the within-named defendants as follows, to wit, on S. P. Wisner, treasurer, on the 16th day of April, 1873, and on William Buchanan, secretary, on the 21st day of April, 1873, at Cedar Rapids, Linn County, & State of Iowa, by reading the same to each of them personally in their presence and hearing, and by delivering a true copy to each of them personally, at Cedar Rapids, in the county of Linn and State of Iowa.

PETER MELENDY,
U. S. Marshal,
A. LAURANCE, *Deputy.*

Marshal's fees: Mileage, 200 miles, $12.00; service on 2, $4.00; copy, 2, $2.00—$18.00.

8 And on the 14th day of April, 1873, said Justus F. Dresser, by his said attys., filed in said clerk's office his petition against said Missouri & Iowa Railway Construction Company; which said petition is in words and figures following, to wit:

Circuit court of the United States for the district of Iowa, May term, 1873.

JUSTUS F. DRESSER
v.
THE MISSOURI & IOWA RAILWAY CONSTRUCTION Company. } Action of assumpsit.

Justus F. Dresser, who avers that he is a citizen of the State of Illinois, complains of the Missouri and Iowa Railway Construction Company, which he avers is a corporation created by and a citizen of the State of Iowa, in a plea of assumpsit.

For that on the first day of November, 1872, at Cedar Rapids,
9 in said circuit, the said defendant, by its promissory note of that date, by it made and subscribed by its president, W. W. Walker, for value received, promised to pay to the order of Wm. Irvin, who is a citizen of Illinois, two thousand five hundred dollars, at the City Bank of Geneseeo, Ills., in two months after date, which period has now elapsed, and said Irvin then & there indorsed & delivered said note to the plaintiff, and by reason thereof the defendant undertook & promissed to

pay said sum to the plaintiff according to the terms of said *rite*, but has neglected so to do.

And also for that on said day & year, at said Cedar Rapids, in said circuit, said defendent, by its other promissory note of that date by it made & subscribed by its said president, for value received, promised to pay to the order of said Wm. Irvin another sum of two thousand
10 five hundred dollars, at the City Bank of Geneseo, Ills., in three months after date, for value received; that said Wm. Irvin then and there indorsed said note to the plaintiffs, and by reason thereof because liable & undertook and promised to pay said sum of money to the plaintiff according to the terms and effect of said note, and said period has now elapsed & the defendant has neglected to pay said sum of money; and also that on the day and year aforesaid, at Cedar Rapids, in said circuit aforesaid, the said defendant, by its other promissory of that date, by it made and subscribed by its president aforesaid, for value received, promised to pay to the order of said Wm. Irvin the sum of five thousand dollars, in four months after date, at the City Bank of Genes'o, Ills., the sum of five thousand dollars, and said Wm. Irvin then and there indorsed & delivered said note to the plaintiff, by reason thereof the defendant became liable, and undertook and
11 to pay said sum to the plaintiff according to the tenor of said note; that said four months has elapsed, and the defendant has neglected so to do.

By reason and consideration whereof, the said defendant has become liable to pay the plaintiff the said several sums of money and interest thereon, amounting to the sum of twelve thousand dollars, for which sum the plaintiff prays judgment.

(Signed) GRANT & SMITH &
GEO. T. WAIT,
Attys. for Plaintiff.

Copy of notes sued upon.

$5,000.00.] CEDAR RAPIDS, IA., *Nov. 1st*, 1872.

Four months after date, we promise to pay to the order of Wm. Irvin five thousand dollars, at the City Bank, Geneseeo, Ills. Value received.

(Signed) MISSOURI & IOWA CONSTRUCTION COMPANY,
By W. W. WALKER, *Prest.*

(Indorsed:) Pay Justus F. Dresser.

WM. IRWIN.

12 (Copy.)

$2,500.00.] CEDAR RAPIDS, IA., *Nov. 1st*, 1872.

Two months after date, we promise to pay to the order of Wm. Irvin two thousand five hundred dollars, at the City Bank, Geneseeo, Ills. Value received.

(Signed) MISSOURI & IOWA RAILWAY CONSTRUCTION CO.,
By W. W. WALKER, *Prest.*

(Indorsed:) WM. IRWIN.

$2,500.00.] CEDAR RAPIDS, IOWA, *Nov. 1st*, '72.

Three months after date, we promise to pay to the order of Wm. Ir-

win two thousand five hundred dollars, at the City Bank, Geneseeo, Ill. Value received.

(Signed) MISSOURI & IOWA RAILWAY CONSTRUCTION CO.,
By W. W. WALKER, *Prest.*

(Indorsed:) WM. IRVIN.

(Endorsed:) Filed April 14, 1873. George B. Corkhill, clerk.

13 And on the 14th day of April, 1873, plaintiff, by his attys., filed in said clerk's office his bond for costs; which said bond is in words and figures following, to wit:

Cost-bond.

Circuit court of the United States for the district of Iowa. May term, 1873.

JUSTUS F. DRESSER
vs.
MISSOURI & IOWA RAILWAY CONSTRUCTION Company. } Action of assumpsit.

I enter myself security in this cause, & agree to pay all costs which may accrue to the opposite party or any of the officers of this court.

(Signed) C. WHITAKER.
APR. 12, '73.

(Endorsed:) Filed April 14, 1873. George B. Corkhill, clerk.

14 And afterwards, to wit, on the 13th day of May, 1873, defendant, by its attys., Mess. Gatch, Wright & Runnells, filed in said clerk's office its answer; which said answer is in words and figures following, to wit:

The answer.

United States circuit court, district of Iowa. May term, 1873.

JUSTUS F. DRESSER
agt.
MISSOURI AND IOWA RAILWAY CONSTRUCTION Company.

The defendant, for answer to the plaintiff's petition, says:

1st. It admits the execution of the notes sued upon.

2nd. It has no knowledge or information sufficient to form a belief whether plaintiff is the owner of the same, or any or either of them.

3rd. The consideration of said notes and each of them has wholly failed.

15 4th. And for further answer and defence, defendant says that said notes, and each of them, were obtained by false and fraudulent representations, by the payee thereof, and the plaintiff had knowledge of all the same when he received said notes and each of them. Said false and fraudulent representations were as follows:

The defendant, at the date of said notes, was, and now is, building a railroad from St. Louis to West Quincy, in the State of Missouri

Railroad Construction Company owned a railroad completed and equipped from West Quincy aforesaid to Keokuk, Iowa. The stock-

holders of defendant owned a controlling interest in the Burlington, Cedar Rapids and Minnesota Railway, running from Minnesota to Burlington, in the State of Iowa, and also had arrangements for the use of the track of the C. B. & Q. Railroad from Burlington to Keokuk.

16 The said Irwin and the plaintiff knew these facts, and also that defendant was desirous of acquiring by purchase a controlling interest in the line of road from Keokuk to West Quincy aforesaid; and therefore, to induce defendant to purchase the stock hereinafter mentioned, the said Irwin made to defendant the following representations, namely: That the Missouri Railroad Construction Company had a capital stock of eighty-four shares of one thousand dollars each; that the said construction company owned twenty-two shares as a corporation; that he, Irwin, owned twenty-two shares of the same, and the remainder was owned by other parties. The said Irwin then and before then knew that the defendant had the option and control of twelve shares of such capital stock held by other parties, which, together with the twenty-two shares held by Irwin, would give the defendant a controlling interest in said railroad, as the construction company also owned the

17 same as aforesaid. Wherefore this defendant, relying upon said representations so made by said Irwin to be true, agreed to purchase his said twenty-two shares of such stock and to give him therefor the sum of fifteen thousand dollars, and such agreement was perfected and the notes here sued upon were executed for such stock; and defendant avers that said representations so made by said Irwin to defendant were false and fraudulent, and were so well known to him, and were made to cheat and defraud defendant. In truth and in fact said railroad construction company did not own twenty-two shares of its capital stock, nor any of the same, and said Irwin well knew that defendant could and would not obtain a controlling interest in said railroad by the purchase of his, said Irwin's, said twenty-two shares.

And the defendant further avers that it and also the said

18 Irwin well knew that said twenty-two shares so held by said Irwin and sold to defendant were of nominal value only, and the only consideration that induced defendant to purchase the same was to obtain the control of said railroad for the purpose of operating the same in connection with its own line and the Burlington, Cedar Rapids and Minnesota Railroad as a through line from St. Louis, Missouri, to Minnesota; and defendant avers that it has been and is wholly unable, by the means of the said stock purchased, and the twelve shares of which it had the option, to control said railroad, or use the same as a part of said through line, and that by reason thereof the consideration, and the only consideration, for the purchase of the same, and the giving the notes sued upon, has wholly and entirely failed, and the said notes, and each of them, were given wholly upon the faith of the truth of the *and* fraudulent representations aforesaid, and not otherwise.

19 And the defendant avers that the plaintiff herein had full knowledge of all the facts herein stated, at and before the time he received or became the owner of said notes, or either of them.

And defendant now here brings into court for tender and assignment to plaintiff, or the said Irwin, the said certificates of the twenty-two shares of stock as aforesaid.

5th. And for further answer and defense, defendant says that the plaintiff paid no consideration for said notes, or either of them; wherefore defendant prays judgment.

(Signed) GATCH, WRIGHT AND RUNNELLS, &
W. M. HUBBARD, *Attys. for Deft.*

STATE OF IOWA, *Linn County, ss:*

I, W. W. Walker, being duly sworn, on oath say that I am president of the Missouri and Iowa Railroad Construction Company; that I have heard read the foregoing answer, and that the facts and matters
20 therein stated are true, as I verily believe.

(Signed) W. W. WALKER.

Subscribed and sworn to before me by W. W. Walker, this 12th day of May, 1873.

[L. S.] (Signed) CHAS. E. WALKER,
Notary Public, Linn Co., Iowa.

(Endorsed:) Filed May 13, 1873. George B. Corkhill, clerk.

21 And on the 14th day of May, 1873, said defendant, by its said attorneys, filed in said clerk's office a motion and affidavit for continuance; which said motion and affidavit are in words and figures following, to wit:

In circuit court United States.

JUSTUS F. DRESSER
vs.
MO. & IA. RY. CONSTRUCTION COMPANY.

Comes defendant and moves the court to continue above cause for reasons appearing in the affidavit hereto annexed.

(Signed) GATCH, WRIGHT & RUNNELLS,
With W. MC. HUBBARD, *Attys. for Defendant.*

22 In the circuit court United States, district of Iowa.

JUSTICE F. DRESSER
vs.
MO. & IA. RY. CONSTRUCTION COMPANY.

STATE OF IOWA,
Polk County, U. S. A., ss:

SAMUEL P. WISNER, being sworn, says he is the duly elected and authorized treasurer of the defendant, The Mo. & Ia. Ry. Construction Company; that William Irwin, Augustus Irwin, E. Pratt Buell, and Justice F. Dresser are important and material witnesses for de-
23 fendant, without whose testimony defendant cannot safely go to trial; that said Irwins reside in the State of Illinois, near the town of Cleveland, in said State; that said Dresser resides at Geneseo, in said State of Illinois, and the said Buell resides either in the State of Illinois or Missouri, which affiant is not now able to state but can ascertain; that it is expected defendant can prove by the said Augustus Irwin and the said William Irwin that the said Augustus Irwin was the authorized agent of the said William in the matters out of which the notes in suit came to be given; that the said notes were given for twenty-two shares of stock of the Missouri Railway Construction Company; that said company built and owned a certain railroad running from Keokuk, in the State of Iowa, to West Quincy, in the State
24 of Missouri; that at the time of making said notes and the trans-

fer of said stock, and as a part of the negotiation resulting therein, the said Augustus Irwin, agent as aforesaid, represented to the president of this defendant that the stock of said Missouri Railway Construction Company was represented by eighty-four shares, of one thousand dollars each, of which said company still owned and controlled twenty-two shares, said representation being made as an indictment to said president of defendant to make said purchase, inasmuch as, with the option defendant had to purchase twelve other shares of said stock, defendant would have a controlling interest in said railroad, whereby defendant could unite said railroad with one being built by it, and thereby make a through line, said Irwins well knowing the object of deft.'s purchase; that said William Irwin was one of the builders
25 of said railroad from Keokuk to Quincy aforesaid, and knew, as did also the said Augustus Irwin, that said Missouri Railway Construction Com'y did not own said twenty-two shares, as by said Augustus represented.

That it is expected deft. can prove by said William Irwin and said Justice F. Dresser that said Dresser knew the foregoing fact at the time the said Dresser became the transferee of said notes, and that said Dresser paid no consideration for said notes.

That it is expected defendant can prove by said E. Pratt Buell that said Missouri Railway Construction Comp'y at the time of the giving of said notes did not own said twenty-two shares of stock, but that the same were owned by him, and that said Irvins knew that such was the fact.

That, as affiant verily believes, defendant in order to elicit the testimony aforesaid must have opportunity to examine the books
26 of said Dresser, who is a private banker in the said town of Geneseo; that affiant believes the above statements to be true, and knows of no other witnesses by whom they can be fully proved; also, that this application is not made for delay merely.

(Signed) SAMUEL P. WISNER.

Subscribed & sworn to before me this 13 day of May, 1873.

(Signed) GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) Filed May 13, 1873. George B. Corkhill, clerk.

27 On the 15th day of May, 1873, the same being of the May term, 1873, of said court, there appears in the records of the proceedings thereof in said entitled cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1873, Thursday, May 15, 1873.

JUSTUS F. DRESSER
vs.
THE MISSOURI & IOWA CONSTRUCTION CO. } No. 1581. Law.

This cause came on this day to be heard upon defendant's motion for a continuance of this cause. Plff. appeared by Grant & Smith, & deft. by Gatch, Wright & Runnells, and the court having heard arguments of counsel, and being advised, sustains said motion and orders that the cause be continued at deft.'s costs.

28 And afterwards, to wit, on the 14th day of October, 1873, said defendant, by it' said attorneys, filed in said clerk's office a mo-

tion and affidavit for continuance;' which said motion and affidavit are in words and figures following, to wit:

DRESSER
vs.
MO. & IOWA CONST. COMP'Y.

Comes deft. and moves the court to continue the above cause for reasons apparent in the affidavit hereto annexed.

(Signed) GATCH, WRIGHT & RUNNELLS,
For Deft.

29 In United States circuit court, district of Iowa.

JUSTICE F. DRESSER
vs.
THE MISSOURI AND IOWA CONSTRUCTION Company.

UNITED STATES OF AMERICA, *ss:*

W. W. WALKER, being sworn, says he is president of the defendant, The Missouri and Iowa Construction Company; that since the last term of this court affiant, with a view to settling the matters in controversy in this action, called upon William Irwin, the former owner of the stock for the purchase of which this note was given, and the assignor of the said note to plaintiff; that said Irwin then informed affiant that said note was transferred to plaintiff for old indebtedness due from him to plaintiff, and not for any new or present consideration; that said Irwin pre-
tended and claimed to exercise some influence in regard to said
30 note; that as a result of said interview said Irwin undertook and agreed with affiant to negotiate a settlement and adjustment of said indebtedness, and to that end undertook to see plaintiff and then call on affiant, at Cedar Rapids, Iowa, and adjust said matter.

That affiant, relying on said promise, together with his knowledge that said Irwin was and is the real party in interest in this action, and said plaintiff but a nominal party, having no real interest in or control over said cause, has delayed taking the testimony of witnesses to sustain the defence contained in the answer herein until too late for the present term of this court; that, as a circumstance tending to show that Irwin is the real party in interest in this cause, affiant states that in discussing the terms of compromise of this action said Irwin insisted
that in any event he should receive from deft., in addition to other
31 considerations, enough to pay the attorney-fees incurred in the prosecution of this action; that Judge Grant, of the nominal plff.'s attorney', would charge large fees, and he, Irwin, must be indemnified against them.

That the said William Irwin, Augustus Irwin, E. Pratt Buell, and Justice F. Dresser are important witnesses for deft., without whose testimony deft. cannot safely go to trial. The said Irwins live in Illinois, and also the said Dresser; the said Buell, in Missouri. It is expected defendant can prove by said William and Augustus Irwin that the said Augustus was the authorized agent of the said William in the transactions out of which the giving of the note in this case arose; that said notes were given for 22 shares of stock of the Missouri Railway Construction Company, which said company had built and owned a

32 railroad run'ing from Keokuk, in the State of Iowa, to West Quincy, in the State of Missouri; that as a part of the negotiation resulting in the making of said note, and as an indictment to the giving of the same, the said Augustus Irwin represented to defendant that the stock of said Mo. Railway Construction Company was represented by eighty-four shares of $1,000.00 each, of which said company still owned and controlled 22 shares, which would be cancelled or distributed pro rata among the stockholders; that they knew at the time that defendant had the option of purchasing 12 other shares of said stock, which, with the 22 owned by said Irwin, would give defendant a controlling interest in said road, without which control said stock would be worthless to deft., as deft. was desirous of having said road as a connecting link in a long line of road being built by it; that said
33 William Irvin was one of the builders of said road from Keokuk to West Quincy, and knew, as did also the said Augustus, that said company did not own said 22 shares of stock, but that the same belonged to E. Pratt Buell.

It is expected to prove by said Wm. Irvin and Justice F. Dresser that the said Dresser knew the for'going facts and is not a bona-fide holder of said notes. It is expected that E. Pratt Buell will testify that at the time of giving said notes said Mo. Railway Construction Co. was not the owner of said 22 shares of stock, but the same were owned by him.

That affiant believes the above facts to be true, and knows of no other witness by whom the same can be proved; that this application is not made for delay merely, but in good faith, and that the evidence of
34 said witnesses would have been taken but for the reliance placed by deft. on the promises hereinbefore referred to.

(Signed) W. W. WALKER.

Subscribed and sworn to before me this 14th day of October, 1873.

(Signed) GEORGE B. CORKHILL,
Clerk U. S. Court.

(Endorsed:) Filed Oct. 14, 1873. George B. Corkhill, clerk.

35 Afterwards, to wit, on the 23d day of October, said plaintiff, by his said attorneys, filed in said clerk's office a motion and affidavit; which said motion and affidavit are in words and figures following, to wit:

U. S. C. C., D. Iowa.

JUSTUS F. DRESSER
vs.
THE MO. & IA. RAILWAY CONSTRUCTION COMPANY.

Now comes JUSTUS F. DRESSER, the plaintiff in this cause, and shows to this court that he has voluntarily come from the State of Illinois to offer himself as a witness for the defendant, & has brought, at the instance of the defendant, his business account-books, that the defendant may inspect the same, and he prays that he may be allowed to send said books to his place of business after such inspection, & he further says that he believes the application for continuance to take his
36 deposition is a mere excuse to delay said cause, and that the defendants have no knowledge of his testimony which would justify

them in using him as a witness, and he prays that they may be ordered forthwith to take his testimony in writing, that he may return to his place of business in Illinois; and the said Dresser further states that Augustus T. Irwin, on Monday night, came to this place at the plaintiff's request to offer himself as a witness for the defendants, upon the facts referred in the affidavits filed for a continuance in this cause; that on yesterday, a few moments before the train going East left, as this affiant is informed, said Augustus T. Irwin was arrested on a warrant on a criminal charge preferred against him by some of the officers of the defendant corporation in connection with the notes sued upon; said process was said to be from Linn County, & from the district
37 court, and the indictment or charge on which it was issued was, as this affiant believes, made by some officer or stockholder in the defendant corporation. This affiant believes that said warrant was executed and the said witness received from his attendance in this court to prevent his testimony at this term, and he prays that the defendant may be ordered forthwith to get a proper writ, order, or request from this court to the district court of Linn County, to have said witness here to testify, or that upon the refusal to do so the cause may proceed to trial without his evidence.

(Signed) JUSTUS F. DRESSER.

Subscribed & sworn to before me by Justus F. Dresser, Oct. 23, 1873.

(Signed) GEORGE B. CORKHILL.

(Endorsed:) Filed Oct. 23, '73. George B. Corkhill.

38 And afterwards, to wit, on the 29th day of October, 1873, defendant filed in said clerk's office an affidavit in support of motion for continuance; which said affidavit is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

DRESSER
vs.
MO. & IA. R'W'Y CONST. CO.

W. W. WALKER, being sworn, says he is president of the Mo. & Ia. R'w'y Const. Co.; that his presence is necessary to the proper trial of the cause of Dresser v. said company, as he is personally familiar with the facts and circumstances out of which the defence in said action arose; that, as he is informed and believes, said case is not likely to be reached for trial this term, and at least not for several days; that there are now pending in the district court of Linn County, Iowa, five
39 causes in which affiant is personally interested, & that said causes involve large sums of money, and that affiant's personal presence is absolutely necessary to the trial of said causes, affiant being an important witness in said causes; that said causes are liable to be reached at an early day, and affiant would suffer great loss and damages if not present when said causes are reached, and that affiant is liable, if compelled to stay in attendance on this court, to be detained from said Linn County at the time said causes shall be reached.

Wherefor' a continuance is asked of said case of Dresser v. Mo. & Ia. Const. Co. at this time.

(Signed) W. W. WALKER.

Subscribed and sworn to before me this Oct. 29, 1873.

GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) Filed Oct. 29, 1873. George B. Corkhill, clerk.

40 And on the 5th day of November, the same being of the October term, 1873, of said court, there appears in the records of the proceedings thereof, in said cause, the following entry, to wit:

United States circuit court, district of Iowa, October term, 1873. Wednesday, Nov. 5, 1873.

JUSTUS F. DRESSER *vs.* MO. & IOWA CONST. CO. } No. 1581. Law.

This cause, coming on for hearing, was continued.

41 Afterwards, to wit, on the 13th day of May, 1874, said defendant, by its said attorneys, filed in said clerk's a notice and motion for production of books and papers; which said notice and motion are in words and figures following, to wit:

In the circuit court United States, district of Iowa.

JUSTUS F. DRESSER *vs.* MO. & IA. RAILWAY CONS. COMPANY. }

To Plaintiff.

You are hereby notified that defendant will, on the the 11th day of May, 1874, at 10 o'cl'k a. m., or as soon thereafter as counsel can be heard, present and ask whence allowed the motion hereto annexed, being a motion to compel the production of certain books and papers therein referred to.

(Signed) GATCH, WRIGHT & RUNNELLS,
Attys. for Defts.

Service of this notice & motion hereby accepted. May 11th, 1874.

42 In the circuit court United States, dist. of Iowa.

JUSTUS F. DRESSER *vs.* MO. & IA. RAILWAY CONS. COMPANY. }

Comes defendant and moves the court to require the plaintiff to produce on the trial of said cause all correspondence between the defendant or its officers and himself, or the Geneseo City Bank of Geneseo, Illinois; also all books of said bank containing entries referring to said notes, including all books containing the account of Wm. Irwin, about the 1st of Nov., 1872, and subsequent thereto up to the com-

43 mencement of this action, and the books showing the receipt of said notes, & all entries connected therewith, and upon to do so that defendant may have nonsuit.

And for cause of such motion defendant says said correspondence and books contain evidence pertinent to the issues in this case, the said books showing the dates of plaintiff's purchase of said notes, the amounts paid thereon, and the dates of payment, and the correspondence showing the fact and date of notice to said plaintiff that said notes were obtained by frauds and misrepresentation.

(Signed) GATCH, WRIGHT & RUNNELLS,
Attys. for Defts.

STATE OF IOWA,
Polk County, ss:

THOS. S. WRIGHT, being sworn, says he is one of the attys. for deft.; that he has seen the books referred in the above motion, and has a copy of some of the correspondence relating thereto, and that the statements made in said motion are true.

44 THOS. S. WRIGHT.

Subscribed & sworn to by T. S. Wright, before me & in my presence, this 9 May, 1874.

[L. S.] E. McLAIN,
Notary Public.

(Endorsed:) Filed May 13, '74. George B. Corkhill, clerk.

45 Afterwards, to wit, on the 14th day of May, 1874, said deft., by its said attys., filed in said clerk's office additional affidavits in support of motion to produce books & papers; which said affidavits are in words and figures following, to wit:

In the circuit court United States, district of Iowa.

JUSTUS F. DRESSER
v.
MO. & IA. R'W'Y CONS. CO.

Comes deft. and makes the following additional showing why the motion to produce papers and books shou'd be granted.

(Signed) GATCH, WRIGHT & RUNNELLS,
Attys. for Deft.

UNITED STATES OF AMERICA, *ss:*

THOMAS S. WRIGHT, being sworn, says that he is one of the attys. for defendant; that I know from the admissions of plaintiff that he is the senior partner of the Geneseo City Bank, a private banking in-
46 stitution in Geneseo, Ill., and has one partner; that the books of said bank contain entries in relation to the notes in controversy, as stated in the original affidavits; that the said plaintiff has produced said books on his own motion at a former term of this court, and upon the taking of his deposition, on file herein, produced the said books before the officer taking the same.

That so far as affiant could observe, without being in said bank, said plaintiff has control over said books and is the controlling partner in

the bank; that every entry concerning these notes, the account of the payee & the dealings of plaintiff relation thereto, are in the books of said bank, and not elsewhere, and affiant refers to the deposition of said Dresser on file in this action.

(Signed) THOS. S. WRIGHT.

Subscribed & sworn to by Thos. S. Wright, before me & in my presence, May 13, 1874.

(Signed) GEORGE B. CORKHILL, *Clerk.*

47 (Endorsed:) Filed May 14, '74. George B. Corkhill, clerk.

48 And on the 15th day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874. Friday, May 15, 1874.

JUSTUS F. DRESSER
vs.
THE MISSOURI & IOWA CONSTRUCTION COMPANY. } No. 1581. Law.

This day this cause came on to be heard upon defendant's motion for a rule upon plaintiff to produce certain books and papers described in said motion. Plff. appeared by Grant & Smith, and defendant by Gatch, Wright & Runnells, and the court, having heard argument of counsel thereon, ordered that said motion be sustained, and that plaintiff produce for the inspection of the court and jury, on the trial of this cause, all correspondence between the defendant or its officers and himself
49 or the Geneseo City Bank of Geneseo, Illinois; also, all the books of said bank containing entries referring to said notes in suit herein, including all books containing the account of Wm. Irwin about the 1st of Nov., 1872, and subsequent thereto up to the commencement of this action, and the books showing the receipt of said notes, and all entries connected therewith.

50 And on the 21st day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874. Thursday, May 21, 1874.

It is now ordered that the case of Justus F. Dresser vs. The Missouri & Iowa Railway Construction Company be now tried before the Hon. James M. Love, sitting apart and holding the circuit court for that purpose.

JUSTUS F. DRESSER
vs.
THE MISSOURI & IOWA CONSTRUCTION CO. } No. 1581. Law.

This cause came on this day for hearing; plaintiff appeared by Grant & Smith, and defendant by Gatch, Wright & Runnells, and then came a jury of twelve good and lawful men, to wit, P. F. Walker, W. F. Hey-

wood, Samuel Reeves, Harmon Ruppin, A. T. Johnson, Thos. Griffith,
E. G. Crosthwaite, Wm. Graham, R. A. McIntyre, David Ran-
51 kin, Simon Doran, B. F. Shaw, who were duly empanneled and sworn to well and truly try the issues joined, and a true verdict render according to the law and evidence given them in court, and they having heard statements of case from counsel, & a portion of the evidence, were excused until 9 o'clock to-morrow morning.

52 Afterwards, to wit, on the 22d day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874. Friday, May 22, 1874.

JUSTUS F. DRESSER
vs.
THE MISSOURI & IOWA CONSTRUCTION COMPANY. } No. 1581. Law.

This cause came on this day to be further heard; parties appear by their attorneys, and the jury came the same as yesterday, and they having heard the conclusion of evidence and a portion of argument of counsel were excused until 8 o'clock to-morrow morning.

53 Afterwards, to wit, May 23d, 1874, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874. Saturday, May 23, 1874.

JUSTUS F. DRESSER
vs.
MISSOURI & IOWA CONSTRUCTION COMPANY. } No. 1581. Law.

This day this cause came on for further hearing; parties appear by their attorneys, and the jury came the same as yesterday, and they having heard conclusion of evidence and argument of counsel and charge of court, retired to a private room, under charge of a sworn officer, to consider their verdict, and after some time spent in deliberation thereon they returned into open court the following verdict, to wit:

54 "We, the jury in the above-entitled cause, find for the plaintiff in the sum of five hundred and forty dollars and forty-nine cents, ($540.49.)

(Signed) "B. F. SHAW, *Foreman.*"

55 On the trial of said cause there was filed in said clerk's a verdict of the jury in said cause, which said verdict is in words and figures following, to wit:

JUSTUS F. DRESSER
vs
THE MISSOURI & IOWA RY. CONSTRUCTION COMPANY. }

We, the jury in the above-entit'ed cause, find for the plaintiff in

the sum of five hundred and forty dollars and forty-nine cents, ($540.49.)

(Signed) B. F. SHAW, *Foreman.*

(Endorsed:) Filed May 23, 1874. George B. Corkhill, clerk.

56 Afterwards, to wit, on the 26th day of May, 1874, said plaintiff, by his said attys., filed in said clerk's office a motion for new trial, which said motion is in words and figures following, to wit:

U. S. C. C., d'st Iowa.

JUSTUS F. DRESSER
v.
THE IOWA & MISSOURI RAILWAY CONstruction Company.

Now comes the plaintiff, on this 24 May, 1874, & moves the court for a new trial in this cause—

1st. Because the verdict of the jury is against the evidence.

2nd. Because the charge of the court was against the law arising in the case.

3rd. Because the court refused to charge the law as requested by the plaintiff.

4th. Because the charge of the court misled the jury.

57 5th. Because the court charged the jury, in substance, that though the plaintiff was a bona-fide holder for value in that noted he could not receive beyond the sum paid before notice of the alleged fraud.

6th. Because the court's charge in relation to the letter of Wisner of 2 Jan'y, 1874, misled the jury & was erroneous.

(Signed) GRANT & SMITH,
For the Plaintiff.

(Endorsed:) Filed May 26, 1874. George B. Corkhill, clerk.

58 And on the 29th day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874. Friday, May 29, 1874.

JUSTUS F. DRESSER
vs.
MISSOURI & IOWA RAILWAY CONSTRUCtion Company. } No. 1581. Law.

This cause came on this day for hearing upon plaintiff's motion for a a new trial herein; the court, after argument of counsel thereon, being fully advised, overrules said motion and orders judgment on the verdict of the jury herein.

It is therefore considered and adjudged that plaintiff have and recover of and from the defendant the sum of five hundred forty & $\frac{49}{100}$ dollars, with interest from the 23d day of May, 1874, and costs of suit, taxed at $, and that execution issue therefor.

59 And on the 25th day of May, 1874, said plaintiff, by his attys., filed in said clerk's office his bill of exceptions; which said bill of exceptions is in words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

JUSTUS F. DRESSER
vs.
THE MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY.

Be it remembered that this cause coming on for trial at the May term of said court, A. D. 1874, the same was tried by the court and a jury, upon the issues joined between the parties.

On the trial the plaintiff, to maintain the issues on his part, offered in evidence the notes sued upon, indorsed to him in due form by William Irwin, the payee thereof, and rested.

60 Whereupon the defendant, to maintain the issues on its part, offered evidence—

That the consideration for said notes was the sale on the 21st of October, 1872, by said Irwin, the payee thereof, to defendant, of 22 shares of stock in the Missouri Railway Construction Company, held and owned by said Irwin.

That prior to and at the time of said sale of said stock one Augustus Irwin, acting as the agent of said William Irwin, represented to the officers and agents of defendant, acting for defendant, that the entire stock of said Missouri Railway Construction Company consisted of 84 shares; that 22 thereof had never been issued; that 12 thereof, belonging to one Simpson, could be purchased by defendant; and that the said Missouri Railway Construction Company had control of a

61 line of railroad called the Mississippi Valley and Western, extending from Keokuk, Iowa, to West Quincy, Missouri.

That defendant was then interested in forming a connecting line of railroad from the city of St. Louis, Missouri, to the city of St. Paul, Minnesota, and was desirous of getting control of said Mississippi Valley and Western Railroad, to be used as part of its said line.

That defendant's said agents then represented to said Irwin's said agent that said defendant, if it purchased said stock, would do so for the sole purpose of acquiring the control of said Missouri Railway Construction Company and thereby the control of said Mississippi Valley and Western Railroad, and that it would not purchase the same at any price for any other purpose.

That defendant bought said 22 shares of stock and executed its

62 said notes in payment therefor, and subsequently bought the 12 shares of the said Simpson, relying upon said representations made to its said agents as aforesaid; that the representations made to defendant's said agents as aforesaid were false and fraudulent; that the said 22 shares so represented as being then unissued had previously been issued to, and were then owned by, one Buell, and that said William Irwin then knew that said 22 shares had been so issued to the said Buell, and that his, the said Irwin's, 22 shares, together with the said Simpson's 12 shares, would not constitute a majority of the stock in said construction company then issued.

That plaintiff, on or about the 1st day of November, 1872, purchased said notes of said Irwin, and the notes were endorsed & then delivered

to him, and was on or about the 27th of January, 1873, by a let-
63 ter written by defendant's president, at New York, January 9th, 1873, and forwarded by S. P. Wisner, defendant's treasurer, to said William Irwin January 25th, 1873, notified that said notes were procured by fraud, not to purchase them, and that defendant would not pay the same; that plaintiff purchased said notes under an arrangement by which he was to pay therefor in installments from time to time, as Irwin should need the money, and that he had paid only part of the consideration therefor, to wit, the sum of $500.00, before the receipt of said notice from defendant; that said 22 shares of stock had no market or other value, and was of no value whatever to defendant for the said purpose for which it had as aforesaid purchased the same.

Whereupon the defendant rested, and the plaintiff, further to maintain the issues on his part, offered evidence—

64 That said stock in said construction company was worth from 80 to 90 cents on the dollar, and had in some instances been bought and sold at that price; that certain officers of defendant, including its president, treasurer, and some of its directors, on or about December 20th, 1872, at Canton, Missouri, became aware that the said 22 shares of stock had been issued as aforesaid to the said Buell, and that the said 34 shares purchased by it as aforesaid were insufficient to give it control of said construction company or said railroad; that thereafter S. P. Wisner, at the time treasurer of defendant, sent a power of attorney to one Rollins, secretary of said construction company, to transfer said shares purchased aforesaid of said Irwin; that said Rollins returned the same to said Wisner because not in proper form, in-
65 closing therewith another in proper form, both of which said Wisner, January 2nd, 1873, inclosed to said Irwin, advising him that on the execution and return to him, Wisner, of the one in proper form said notes would be paid, and that the said Irwin executed and returned to said Wisner the said power of attorney in proper form, and showed the letter of the said Wisner to the plaintiff on the 3rd or 4th of January, 1873.

That on May 3rd, 1873, after the commencement of this action and after notice to defendant that the plaintiff had purchased the notes, defendant's president proposed to Irwin the cancellation of the contract and surrender of the stock, and that Irwin declined, saying he had sold the notes.

Whereupon the plaintiff rested, and the defendant, further to maintain the issues on its part, offered evidence—

66 That the said Wisner was simply the treasurer of defendant and had no authority as such treasurer or otherwise to make any contract or waive any right or defense of defendant with respect to said 22 shares of stock or said notes given in payment therefor.

That the first meeting of defendant's board of directors after the execution of said notes was held on the 23rd of January, 1873.

Thereupon, after the evidence was concluded, the plaintiff asked the court to charge the jury that if they believed from the evidence that the plaintiff purchased the notes in controversy of Wm. Irwin for a valuable consideration on the 1 of November, 1872, and paid 500, part of the consideration, on 21 January, 1873, before any notice of any fraud in the contract, he was entitled to receive the whole amount of the notes,
67 and the court refused this instruction. But the court charged the jury as follows:

That in the first place the jury must find that there was fraud in the

inception of the notes as alleged, and that if the defendants failed to satisfy the jury of that fact his whole defense fails.

That if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid five hundred dollars upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only pro tanto, that is, to the amount paid before he received notice.

The plaintiff asked the court to instruct the jury that if they believed, from the evidence, that the Missouri & Iowa Construction Company
68 on the 20 Dec., 1872, knew that the twenty-two shares of stock represented by Irwin to belong to the company belonged to Buel, & their treasurer, Wisner, on the 2 Jan'y, 1873, returned the improper power & enclosed a proper power of attorney to transfer said stock to said company to Wm. Irwin, and notified Irwin that on the execution of said power of attorney & return to him the notes would be paid, and Irwin did properly execute said power of attorney & return it to Wisner, the plaintiff was entitled to recover; which instruction the court refused to give in that form, but gave the qualification thereof as set out below.

The court gives the foregoing to the jury as a correct proposition of law, with the following qualification: that the party who wrote the letter as alleged must have been authorized to affirm the contract after
69 he had notice of the fraud. The jury are to consider what relation the treasurer, Wisner, bore to the makers of the notes; whether or not he was an officer who had any power except to keep the money of the company and pay it out on proper orders. It is not every officer of a corporation who has authority to make or affirm contracts. If an individual receiving notice of fraud in a contract to which he is a party, and waives the fraud or affirms the contract, he is bound by it, and a corporation may in like manner by its proper officers having due authority affirm a contract or waive a fraud which would otherwise be a good defense against it. You must, therefore, in order to give the plaintiff a verdict on the ground that the contract was affirmed or the alleged fraud waived by Wisner, be satisfied by the evidence that he was authorized to do so.

70 If the writer of the letter in question was merely the treasurer of the defendant corporation, that fact did not of itself authorize him to make or affirm contracts.

The treasurer of a corporation, who is the custodian of the funds of a company, has in general no authority to make or affirm contracts between the corporation and other parties by virtue of his office merely.

To which said several refusals and instructions the plaintiff, by his counsel, then and there excepted and prayed the court to sign and seal this bill of exceptions; which is accordingly done this 25th day of May, 1874.

(Signed) J. M. LOVE, *Judge.* [SEAL.]

(Endorsed:) Filed May 25, 1874. George B. Corkhill, clerk.

71 And on the 28th day of May, 1874, there was issued from said clerk's office, and filed in said cause, a writ of error, which said writ is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court, before you, between

Justus F. Dresser and the Missouri and Iowa Construction Company, a manifest error hath happened, to the great damage of the said Justus F. Dresser, as by his complaint appears; and we, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

(Signed) GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, Dist. of Iowa.

72 And on the 15th day of July, said plff., by his said attorneys, filed in said clerk's office his appeal-bond, which said appeal-bond is in words and figures following, to wit:

Know all men by these presents that we, Justus F. Dresser, principal, and B. B. Woodward, surety, are held and bound to the Missouri & Iowa Railway Construction Company, in the penal sum of two hundred and fifty dollars, to which payment we bind ourselves, and each of us. Given under our hands this 22nd day of June, 1874.

The condition of this obligation is that whereas Justus F. Dresser is about to sue out or has sued out a writ of error from the Supreme Court of the United States to the circuit court of the United States for the district of Iowa, in a certain case wherein he is plaintiff, and the said company is defendant:

73 Now, if he shall pay all costs and damages awarded against him and abide by and perform the orders of the Supreme Court therein, this obligation to be void; otherwise to be in full force.

(Signed) JUSTUS F. DRESSER.
(Signed) B. B. WOODWARD. [SEAL.]

I, B. B. Woodward, being first duly sworn, depose & say that I am a resident of the State of Iowa, & have property herein liable to execution to double the amount of this bond.

(Signed) B. B. WOODWARD.

STATE OF ILLINOIS, *Henry County, ss:*

I, William H. Owen, a notary public in said county, hereby certify that Justus F. Dresser, personally known to me, appeared before me this day, and acknowledged the signing of the above bond, and I also certify that s'd Justus F. Dresser is a resident of Henry County,

74 in the State of Illinois. Dated this 22nd day of June, A. D. 1874.

[L. S.] (Signed) WILLIAM H. OWEN,
Notary Public.

Subscribed and sworn to by B. B. Woodward, before me, this 23rd day of June, 1874.

[L. S.] (Signed) C. A. FICKE,
Notary Public.

(Endorsed:) Filed July 15th, 1874. George B. Corkhill, clerk.

And on the 15th day of July, 1874, said plaintiff, by his said attorneys, filed in said clerk's office a citation, with return of service endorsed thereon; which said citation is in words and figures following, to wit:

75 Supreme Court of the United States, October term.

JUSTUS F. DRESSER
vs.
THE IOWA & MISSOURI RAILWAY CONSTRUCTION Company.

To the Iowa & Missouri Railway Construction Company:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be held at the Capitol, at Washington, on the second Monday in October, 1874, to answer to a writ of error sued out of the said Supreme to the circuit court for the district of Iowa, wherein said Dresser is plaintiff, & you are defendant, in error.

MAY 28, 1874.

Service accepted this 18th day of June, 1874.

GATCH, WRIGHT & RUNNELLS,
Att'ys for Defendant.

(Indorsed:) Justus F. Dresser v. The Iowa & Missouri R. W. Construction Company. Citation. Filed Jul' 15, 1874. George B. Corkhill, clerk.

76 In the circuit court of the United States for the district of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all pleadings, papers, and record-entries, and judgment in a certain cause adjudicated in said court, wherein Justus F. Dresser was plaintiff and the Missouri and Iowa Railway Construction Company was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this 11 day of September, A. D. 1874.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. C. C., District of Iowa.

77 In the Supreme Court of the United States.

JUSTUS F. DRESSER, PLAINTIFF IN ERROR,
vs.
THE MISSOURI AND IOWA RAILWAY CONSTRUCTION Company, deft. in error.

Now comes Justus F. Dresser, plaintiff in error, and says that in the

record and proceedings of this cause in the circuit court of the United States for the district of Iowa, there was error in this, to wit:

First. That the court erred in refusing to instruct the jury at the request of the plaintiff as follows:

"That if they believed, from the evidence, that the plaintiff purchased the notes in controversy of Wm. Irwin for a valuable consideration on the 1st of November, 1872, and paid $500, part of the consideration, on the 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to receive the whole amount of the notes."

Second. Because said court charged the jury, in substance, that the plaintiff was not a bona-fide purchaser of said notes except to the extent of the amount paid without notice of fraud in their inception,
78 and could only recover that amount after such notice.

Third. Because said court refused, as requested by the plaintiff, to charge the jury in effect that the notice by the treasurer of the deft. corporation, with a full knowledge of the alleged fraud, to Irwin, that on the execution by him of a proper power of attorney for the transfer of the stock the notes would be paid, was a ratification by said corporation of the purchase of stock and binding upon it in law.

Fourth. Because the court erred in instructing the jury that said notice of the treasurer was not a ratification of the contract of sale unless they found from the evidence that said treasurer had express or implied authority from the corporation to make such ratification, and that the fact that Wisner was treasurer alone did not authorize him to affirm the said contract of sale.

Wherefore the plaintiff prays that said judgment may be reversed by this court.

JUSTUS F. DRESSER, *Plff.*
By GRANT & SMITH, *His Attys.*

(Indorsement on cover:) No. 268. Justus F. Dresser, plaintiff in error, vs. The Missouri and Iowa Railway Construction Company. Iowa C. C. U. S. Filed 26th September, 1874.

REC. 268—3

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1874.

JUSTUS F. DRESSER,
Plaintiff in Error.
vs.
THE MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY,
Defendant in Error.

No. 268.

In Error to the Circuit Court of the United States for the District of Iowa.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

FACTS.

The plaintiff brought an action on three notes for $5000, $2500, and $2500 each, dated Nov. 1, 1872, payable in two, three and four months after date, executed by the Missouri and Iowa Railway Construction Company to Wm. Irwin, and by him endorsed to the plaintiff. (Record, page 3.)

The defendant pleaded fraud in the execution of these notes, as follows: that the defendant was building a road from St. Louis to West Quincy; had a controlling interest in the Burlington, Cedar Rapids and Minnesota Railroad Company, and

had arrangements with the Chicago, Burlington and Quincy Railroad Company for the use of that road to Keokuk ; that Irwin knew this and that defendant wanted to get controlling interest in the road from Keokuk to West Quincy ; and Irwin made to defendant the representation that the Missouri Railway Construction Company had a capital stock of eighty-four shares of $1000 each ; that the company owned twenty-two shares, that Irwin owned twenty-two shares, and the remainder was owned by other parties ; that Irwin knew defendant had the option of twelve shares, which with Irwin's twenty-two shares would give the defendant the control of the said railroad from West Quincy to Keokuk, owned by the Missouri Railway Construction Company. Defendant relying on this representation, bought Irwin's twenty-two shares for the notes given. This representation was untrue, and Irwin knew defendant could not obtain a controlling interest in said railroad ; that plaintiff had notice before the purchase of the notes. (Record, page 5.)

Issue, trial by jury—verdict for plaintiff for $540,49, only a small portion of the notes. (Record, page 14.) New trial overruled. (Record, page 14.) Bill of Exceptions. (Record, page 16,) and following :

The bill of exceptions shows that plaintiff offered the notes in evidence duly endorsed ; that defendant offered evidence to show that the consideration of the notes was twenty-two shares of stock in the Missouri Railway Construction Company, out of eighty-four shares, the whole number, of $1000 each. That prior to this sale Irwin's agent represented that the entire stock was eighty-four shares, that twenty-two shares were never issued ; that the twelve shares belonging to Simpson, could be purchased, and that the Missouri Railway Construction Company, had control of a lease of said railroad called the Mississippi Valley and Western Railroad, extending from Keokuk to West Quincy, Missouri. That defendant was interested in forming a line from St. Louis to St. Paul, and wanted to get control of the Mississippi Valley and Western Railroad. That defendant's agents represented to Irwin's

agent that the sole purpose in purchasing was to get that control and would not purchase at any price for any other purpose. Defendant bought Irwin's twenty-two shares and afterwards the twelve shares of Simpson, relying on said representations, which were false and fraudulent. That the twenty-two shares represented as being unissued had been previously issued to and were owned by one Buell, and that Irwin knew it ; and that Irwin's and Simpson's shares would not constitute a majority of the stock ; that plaintiff, about November 1st, 1872, purchased the notes of Irwin, and the notes were endorsed to him ; that on the 27th of January, 1873, by a letter written by defendant's president and forwarded by Wisner, defendant's treasurer, to Irwin, plaintiff was notified that the notes were procured by fraud, not to purchase them, and that defendant would not pay them. That plaintiff purchased the notes under an arrangement that he was to pay for them by installments, and that he had paid only part of the consideration at the time of said notice, on the 27th day of January, 1873. That said twenty-two shares of stock had no market value, and were of no value to defendant for said purpose for which it had purchased the same.

The defendant then rested. (Record. pages 16 and 17.)

Plaintiff proved that said stock was worth from 80 to 90 cents on the dollar, and had in some instances been bought and sold at that price ; that the President, Treasurer and some Directors of the defendant, on December 20, 1872, at Canton, Missouri, became aware that said 22 shares of stock had been sold to Buell, and that said thirty-four shares purchased were not sufficient to give defendant control of the construction company and its road ; that after this, Wisner, the Treasurer of the defendant company, sent a power of attorney to the Secretary of the Missouri Railway Construction Company, one Rollins, to transfer the shares purchased of Irwin ; that Rollins returned the same to Wisner because not in proper form, enclosing one in proper form, both of which Wisner, the Treasurer, on the 2d of January, A. D. 1873, sent to Irwin, advising him that on the execution and return of the one in proper form, said notes would be paid ; and Irwin executed and returned to Wis-

ner the said power of attorney, in proper form on the 3d or 4th of January, A. D. 1873.

Defendant proved that Wisner was simply the Treasurer of the company, and had no power to make any contract or waive any right or defence of defendant.

That the first meeting of the Board of Directors, after the purchase, was on the 23d of January. 1873.

The plaintiff asked the court to charge the jury that if plaintiff purchased the notes for a valuable consideration, on the 1st of November, 1872, and paid $500, part of the consideration, on the 21st of January, 1873, before any notice of any fraud, he was entitled to recover the whole amount of the notes. The court refused so to charge the jury, but did charge that they must find fraud in the inception of the notes or defendant's defence failed. That if fraud was established, and plaintiff paid $500 before notice, and that after notice of the fraud he paid the balance, he is protected only for the $500.

The plaintiff asked the court to charge the jury that if defendant, on the 20th of December, 1872, knew that 22 shares of stock, represented by Irwin to belong to the company, belonged to Buell, and their treasurer, Wisner, enclosed a power of attorney to Irwin to transfer the stock to Irwin, and notified Irwin that on the execution of the power of attorney and the return of the same to him, the notes would be paid, the plaintiff was entitled to recover. The court refused this charge in that form, but gave it with the following qualification :

That the party who wrote the letter, as alleged, must have been authorized to affirm the contract after he had notice of the fraud ; that the jury are to consider what relation Wisner, the treasurer, bore to the makers of the notes—whether he was an officer who had any power except to take care of the money of the company, and to pay it out on proper orders.

You must therefore, in order to give plaintiff a verdict on the ground that the contract was affirmed, or the fraud waived, by Wisner, be satisfied by the evidence that he was authorized to do so.

If Wisner was merely the treasurer of the defendant corporation, that fact did not of itself authorize him to make or affirm contracts.

The treasurer of a corporation, who is custodian of the funds of the company, has in general no authority to make or affirm contracts by virtue of his office merely.

Exceptions were taken by the plaintiff to the instructions given and refused by the court.

ERRORS ASSIGNED.

(Record, page 21.)

1. The court erred in refusing instruction asked by plaintiff, that if plaintiff purchased the notes in controversy for a valuable consideration on the 1st of November, 1872, and paid $500, a part of consideration, on the 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount.

2. The court charged, in substance, that the plaintiff was not a *bona fide* purchaser, except to the extent of the amount paid without notice of fraud in the inception of the notes.

3. Because the court refused to charge the jury that the notice by the treasurer of the defendant, with full knowledge of the alleged fraud, to Irwin, that on the transfer of the stock the notes would be paid, was a ratification by the defendant of the purchase, and binding upon it in law.

4. Because the court erred in charging that said notice of the treasurer was not a ratification of the contract, unless they found that he had express or implied authority from the corporation to make such ratification, and the fact of his being treasurer did not alone authorize him to affirm the sale.

POINTS OF LAW.

The court, on the evidence, ought to have given the charge asked by the plaintiff, that if the plaintiff was a *bona fide* purchaser of the notes, and had paid a part of the purchase money

before notice of the alleged fraud, he could recover the whole amount.

The court ought to have given this instruction for two reasons.

1. There was no fraud in the inception of the notes. The alleged representation was that the corporation, whose shares plaintiff was selling, had only 84 shares, of which Irwin owned 22, 12 others could be bought of Simpson and 22 still belonged to the corporation. The argument of the defendant was that 22 plus 12, making 34, would give the defendant the control of the corporation. Why, it made no difference whether the 22 shares of stock were issued or not : they were a part of the stock, and the purchase of 34 shares would not control 84. The purchaser could not get the other 22, whether owned by the corporation or another person, without paying for them.

The agent of Irwin did not represent that the purchaser of his stock could also purchase the 22 shares not yet issued—and they were worth 80 or 90 per cent., and had been sold at that price. The contemplated fraud in the case was not by the seller of 22 shares, but by the purchasers, who expected then to get control of a corporation for a purpose, of which I need not say anything, except that it was not a commendible one.

There was no fraud in anything represented : for it could make no difference in law whether the shares were held by the company for sale or by a third party. The defendant, to get them of this company, must pay par for them, unless power is shown to sell at less than par. It is nowhere shown by the evidence that the defendants were prevented from getting the control of the corporation by the transfer of the 22 shares to Buell.

2. But the plaintiff is admitted to be a *bona fide* purchaser of all the notes before due, and to have paid part of the purchase money before notice.

The court limited the right to recover to only the amount paid.

We think this is not the law.

The Supreme Court of Iowa, in National Bank of Michigan vs. Green, 33 Iowa, 140, "without attempting a review of the

"authorities bearing on this branch of the demurrer, we deem "it sufficient to state as our opinion that the endorsee, in good "faith, of a promissory note, is entitled to recover of the "endorser the whole amount of the note."

In Park Bank vs. Walters, 42 New York, Appeals, 490 : "The general principle deducible from the decisions is, that a "party will be protected as the holder of negotiable paper, "although fraudulently transferred, when he has received it "before maturity without notice of fraud, and in good faith, "and parted with *something* of value for it at the time of its "transfer."

In that case, only part of the purchase money was paid.

So in Fowler vs. Strickland, 107 Mass., 552 : "The plaintiff had the same right as any other person to purchase the note from Loomis for such price as might be agreed upon. Even if, by the terms of such an agreement, Loomis had retained any interest in the proceeds of the note which he delivered to the plaintiff, the latter could recover the full amount, although he might have held a part in trust for Loomis."

Parsons on Bills and Notes, Edition 1875, Vol. 2, page 426, says : "That negotiable paper may be sold for what the seller and buyer may agree upon, it would seem absurd to deny" (page 426).

"Our opinion is, that the purchaser of a note may recover the whole amount for which it is payable from all the parties to it" (same, page 429).

2. We contend that the court erred in refusing to charge that if the treasurer of the defendant, after a knowledge of the alleged fraud, promised to pay the notes, if a proper power of attorney to transfer the stock was executed, was a waiver of the alleged fraud. The treasurer of a private corporation is its cashier or general agent to pay out its money. The court assumed that he could only pay on orders of his corporation.

"The importance of the distinction between general and special agents, lies in the rule, that if a particular agent exceed his authority, the principal is not bound—but if a general agent

exceed his authority, the principal is bound provided the general agent acted within the ordinary and usual scope of his business." (1 Parsons on Contracts, page 41.) "Where an agent is employed to transact some specific business and only that, yet he binds his principal by such subordinate acts as are necessary or usually and properly done, in connection with the principal act or to carry the same into effect."

1 Parsons on Contracts, page 49.

Now suppose the president, some of the directors and cashier of a bank, having executed a note of the bank, enquire into an alleged fraudulent transaction about the inception of the note and know all about it, and the cashier afterwards informs the payee of the note, send me a power of attorney and I will pay the note, and it is sent; does anybody doubt that the bank is bound?

The cashier of a bank and the treasurer of a railway corporation are the same. Who ever supposed before, that the treasurer of a company, doing business and paying money to hundreds, perhaps thousands of persons, in the actual transaction of its affairs, cannot pay the debts of the corporation incurred in its ordinary business without special warrant, or that he was likened to the treasurer of a public body of limited authority and prescribed duties.

JAMES GRANT,

For Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JUSTUS F. DRESSER,
Plaintiff in Error,

vs.

THE MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY.

In Error to the Circuit Court of the United States for the District of Iowa.

ARGUMENT FOR DEFENDANT IN ERROR.

It is very plain that the weight of this case depends upon the view taken by the court below of the effect of the notice to plaintiff of the fraud in the inception of the notes, given *after* the payment of the $500 and *before* the payment of the balance, and without evidence to show that he ever did pay anything more, of the alleged purchase price by the plaintiff to the indorser and payee. In other words, was the plaintiff under the circumstances protected only *pro tanto*, that is, to the amount paid *before* he received (such) notice, or was he protected so far as to be entitled to recover the whole or full amount of the notes?

And we confess to not a little surprise that counsel for plaintiff in error, usually so ready to apprehend the true point

at issue and to come at once to its discussion, should in this instance apparently so entirely mistake it and undertake to prove what it is not at all needful for us to either deny or controvert.

For admit that negotiable paper may be sold for what the buyer and seller may agree upon—admit that the holder of such paper may recover of the *indorser* the whole amount of the paper, and that he is not limited necessarily to the amount paid therefor, with interest thereon—we say, though we admitted all this, we would still not reach nor more than approximate the question made in this case; and the authorities cited by counsel, we may remark, do no more than bear (and some of them very remotely) upon the propositions which they discuss, and which if conceded would avail them next to nothing.

If this were a case where plaintiff bought these notes for $500 or $1000 which was paid before notice of the fraud, (this being all the purchase price,) then it might be claimed, waiving any question of good faith, or as to the true nature of the transaction, that it was not for defendant (the maker of the notes) to claim that the holder must be limited in his recovery to the amount thus paid for such notes. Suppose, however, he had bought the notes for $1000, or any other sum, either the full value of the notes or even much less, *to be paid*, and *before* payment, and while the matter thus rested simply as an unextended contract, he had notice of the fraud, would it be claimed that he was protected as an innocent holder? And yet in principle that is this case. The plaintiff in error must not expect to escape the real issue by setting up a man of straw for us to protect and for him to knock down, having no kind of relationship to the real figure or point in the case.

That we are not mistaken as to the inapplicability of the cases relied upon by the plaintiff in error, and that for some cause, not material to examine, counsel quite overlook or misapprehend the whole tenor and scope of our defense, a very brief reference to them will abundantly show.

Take the case of *Fowler vs. Strickland*, 107 Mass., 552, for instance. There plaintiff indorsed defendant's paper in blank and for defendant's accommodation. Defendant used the paper by borrowing money and for full value. He was unable to pay; thereupon plaintiff took up or obtained the note by paying the holder about one-half the face of the same; and defendant on the trial claimed that plaintiff could only recover the amount paid by him for the notes, with interest. The court, however, held that the plaintiff had the same right as any other person to purchase the notes of the holder, and having purchased the entire interest in and *paid for the same*, he might recover the whole amount. Here it will be seen the note was for the accommodation of defendant, not plaintiff, and that no question of fraud, of notice before or after the payment of the purchase price, or anything akin to it, arose. No two cases could be more unlike.

So in New York (*Park Bk. vs. Watson*, 42 N. Y., 490) the question raised was whether one who took accommodation paper which had been fraudulently diverted from the purpose for which it was made, but without notice, could be protected as a *bona fide* purchaser when he received it as collateral for a previous note not yet due, and in lien, too, of and upon the surrender of other collaterals past due and protested, such other collaterals being worthless and the parties thereto insolvent. There the transaction was complete and it is but too plain, from the whole opinion, that the cardinal inquiry was whether the unlawful diversion (conceding it) could effect the notes in the hands of plaintiff, who it was found had no notice of the fact. The holder of negotiable paper is, it might be conceded, protected "where he receives it before maturity, without notice of the fraud and in good faith, although the transfer is fraudulent when he also parts with something of value for it at the time of the transfer." And it is this language in substance, found in this opinion, upon which counsel rely. But *non constat* that he is protected as to all the paper, or all that he may pay, if he undertakes to pay in installments, as in this case, and has

notice of the fraudulent inception of the notes while the contract is unexecuted, and before he parts with all the value agreed to be paid, and especially so where there is no evidence that he parted with anything after such notice, as in the case at bar. For there very different rules and principles come in and must obtain.

The case of *Bank of Michigan vs. Green*, 33 Iowa, 140, is as unlike this as could be well imagined. There the court, without reviewing the authorities but recognizing that they are not in harmony, simply state as their opinion that the indorsee in good faith of negotiable paper is entitled to recover of the indorser the full amount of the note, and (as it is understood, though it is not so stated in terms) without reference to the amount paid by the indorsee therefor. Concede this doctrine as fully as stated, the difficulty in its application is that we deny that plaintiff was a *good faith purchaser* of the notes, except to the extent that he had paid before notice of fraud. Not only so but defendant is the *maker*, not the *indorser*, of this paper. And when counsel for plaintiff in error will give the court something bearing upon this question, they will begin to throw a little, a feeble ray of light, more than they have in their argument, upon the real point in the case and not before.

Now, aside from some general language quoted from Parsons on Notes and Bills, and which we need not stop to controvert, these are all the authorities upon which counsel rely. Certainly we are not mistaken in saying that they do not touch the point here presented. And we can well assume that these are all of the authorities to be found in the least aiding the plaintiff; for we know too well the industry of counsel, and their familiarity with the books to suppose that they have omitted any from which they could derive the least comfort or support. Their very weakness and inapplicability in a case argued by counsel so eminent and so celebrated for finding all the books contain in their favor, is the strongest argument against their position.

But let us come to the other side for a moment. Plaintiff did not buy these notes for a gross sum (and whether more or less than their face), paying the whole at the time and before the maturity of the paper, and before notice of the fraud. But he was to pay in installments, or in sums as needed — paid $500, and before parting with anything more, or making any other payment (and he never did pay more), he had notice; and just there the court below held that if he paid more it was at his peril, for that he could not after that be acting in such good faith as that he would be protected against this defense (if one existed, of which more hereafter), save as to the amount before that time and which was all he advanced, and for which it will be seen he recovered. And this we say is the law. It certainly is for anything said or cited by counsel on the other side. And it is, because it is in accord with the reason and justice of the law, and fully sustained by the cases.

Be it borne in mind, that plaintiff did not make any note to Irwin, nor any contract in writing by which he became obligated, or which could or did pass into the hands of third persons. There is hence no third person in this case. The arrangement was (Tr. 17, Fol. 63), that he was to pay in installments from time to time as Irwin should need the money, he had only paid part of the consideration ($500) before he had notice of the fraud, and never did pay more. Failing in this case, therefore, the matter is alone between Irwin and himself, and his defense as against Irwin, if sued on his contract, would of course be complete. Now upon principle and reason therefore could anything be plainer than that plaintiff as to all above the $500 is not a purchaser in good faith, and without notice? One who takes a negotiable note without parting with any thing for it, is not a good faith purchaser. And this for the simple reason that he parts with nothing and is in no better position than his indorser or the payee. He has no equities in any view, or under any system of jurisprudence, legal or equitable. The element of "valuable consid-

eration" passing from the indorsee to the indorser, or from the purchaser to the holder, is as essential as that of "good faith," or that of the capability of the transferer to give title. The amount of the consideration paid the indorser, as between the holder and maker, may or may not in a given case be material; but to his protection it is vitally essential that he should at least be a purchaser *for value*. There must be a "valuable consideration" and if before the value passes there is notice, and especialy where no other value passes after notice, the party is no more protected than if he had full notice before he commenced his negotations. Why, it is monstrous to say that one can by merely *promising* to pay something for negotiable paper, be protected as to all he may afterwards pay, when the maker does all that the law requires, to give full notice of the infirmity of the paper, before any such payment is made. It would be in the face of all the logic and reason of the law, and every principle upon which the law of negotiable paper rests: (See 1 Parsons on Notes and Bills, 219.) Public policy, we know gives to negotiable paper no little immunity, and goes very far in protecting the holder of the same. But it exacts certain conditions, and demands certain things, at the hands of those taking such paper, as inexorably as it enforces its abstract rules for their protection. The maker of such paper is fortunately not entirely without remedy in every case where a mere volunteer gets it into his hands. The holder cannot play with it at his pleasure, nor get other or greater rights than the payee, unless he brings himself within the law and attains the position of an honest, *bona fide* holder of such property, and he cannot be this honest holder unless he has either paid the consideration before notice, or so obligated himself as that in law, he became bound to pay the same, and without defense to such obligation. He is no more honest in such a case, than if he had bought one of a series of notes before notice, and after notice of the fraud which stained the whole transaction, he had bought all the

others. He might be protected as to the first, but not as to the others. Nor can he when he has notice before he parts with the consideration, or in any legal sense changes his relation to his property. For it is clear beyond all controversy that an indorsee without consideration is no more protected than the payee. For whether the transfer was a mere pretense or a gift in good faith, there is no such negotiation as the law contemplates or protects. As to the amount advanced in good faith, he may recover. To this extent he may sue at law in his own name. In equity he has a lien upon the note or security to protect him for the amount advanced or paid. As to the balance he may not recover, if there is good defense against the payee. If there was no defense he may recover the whole, though entitled to but part, for in legal contemplation it matters not to defendant whether the recovery is in the name of the payee or indorsee. But if a good defense—extending to the indorsee in part as to the payee in whole—the holder shall not recover for such excess, but must be content with being restored to that which he has lost or paid, before notice of the defense. As to such he holds the note, so to speak, as the trustee of the payee, and his equities can rise no higher, nor be any greater.

And just here we can well pass from the reason of the law to a very brief citation of, and reference to, the cases in its support.

In *Chicopee Bank vs. Chapin*, 8 Met., 40, Shaw, C. J., says "that plaintiffs can recover only so far as they were holders for value," and *arguendo* so far as they could recover beyond that they would recover *for the use of the indorser or payee.* In the case at bar the indorser could not recover at all, and hence neither could the indorsee or holder.

In *Williams vs. Smith*, 2 Hill, 301, it was held, where the holder took paper as collateral security against indorsements to be made by him for the indorsee, which indorsements were made, that plaintiff was a holder for value, having no notice

of the equities or defense set up; but that he could not recover beyond the amount remaining due on the principal demand, or the indorsements for which the paper was pledged; and hence that though he took the paper as a holder for value, with the right to sue in his own name, he could not enforce it beyond the amount of his advancements or indorsements.

In another case the indorsee in taking the paper gave his bank-checks payable at future periods, it being agreed that they should not be presented at the bank but when the money was wanted they should be returned to the indorsee and new checks given, and this arrangement was subsequently carried out. Before the checks were presented or exchanged, or anything paid, plaintiff and indorsee had notice of the fraud in obtaining the paper. It was held that he was not a *bona fide* holder, for he had paid nothing, if at all, until after he was notified of the fraud. (*Crandall vs. Vickery*, 45 Barb., 156.)

See also *Citizens Bank vs. Payne*, 18 La. Ann., 322, and *Grant vs. Kidwell*, 30 Mo., 455, where it is held that the party taking paper as security can only recover to the amount of his liability, or to the amount which the indorser is held liable to pay him. *S. P.: Roche vs. Ladd*, 1 Allen, 436; *Easter vs. Millard*, 36 Ill., 494; *Stalker vs. McDonald*, 6 Hill, 93; and see *Bancroft vs. McKnight*, 11 Rich, 66, and *Holeman vs. Hobson*, 8 Humph., 127. It will not do to assume that plaintiff is a *purchaser* and therefore, upon some technical rule, to be protected. If he stands on this ground, then he would be as well protected by a mere purchase at once and before or without advancing anything, as if he had advanced ever so much. And if he would not as to all or any part in such case, neither can he be, in principle, any more protected as to what he may advance after full and sufficient notice of the fraud. He is not allowed—the law will not permit him—to thus heedlessly and needlessly part with his money to render more insecure the rights of a party upon whom a fraud has been practiced and of which he has notice. As he can protect himself by

staying his hand, so the law and good conscience require that he should. And even much stronger are defendant's equities, and much weaker, if possible, those of plaintiff, where he does stay his hand, recognizes the notice of the fraud, and makes no further advance. For thus as he parts with nothing more he is in no just or equitable sense a loser, if he is repaid all he expended. In such a case the rights of both parties are properly guarded, and the note goes to the fraudulent payee, who is left to his remedy, if any he has, upon his iniquitous and illegal contract.

But the court will find this question well and fully discussed in *Allaire vs. Hartshorn*, 1 Zab., 665, where it is expressly held that where the holder (*bona fide*) has only advanced part of the value of the note he can only recover the amount so advanced, and the residue of the note is void (being entirely without consideration). The reason and philosophy of the rule for which we contend are there so well stated and the cases so fully examined, that we shall not trespass upon the time of the court by attempting to quote or comment upon the very able opinion of the learned Chief Justice. It is in its reasoning and conclusion on "all fours" with this, and we are content to here leave this the main point in plaintiff's assignment of errors. It is complete in its authorities and unanswerable in its logic.

II.

Plaintiff insists further that there is error in this record, or rather that his instruction should have been given, because there was no fraud in the inception of the notes.

In answer we say—

First. The question of fact—was there such fraud—was fairly and fully submitted to the jury. (Record, folio 67.) The jury must have found such fraud, and that concludes all further inquiry on this subject in this court.

Second. Plaintiff did not pretend to make any point upon this question of fact in the court below. Nowhere in the record is there any pretense that the instruction was erroneously refused, or its opposite erroneously given, by reason of any want of evidence on this subject.

Third. The assignment of errors raises no such question. There is no suggestion therein that there was not ample proof of such fraud to defeat these notes in the hands of the original holder or payee or one having notice.

Fourth. The plea set out the fraud with great particularity and just as the evidence established it. To this plea there was no demurrer or other objection, and counsel evidently felt and knew the defense to be good. This point is therefore an after-thought to help out, if possible, a hopeless case.

Fifth. But the fraud, assuming that this court will enter upon such inquiry, is too well established to admit of doubt. Plaintiff's construction of the testimony is both illogical and unwarranted, as the slightest examination of it will show. The length of this argument, and a conviction that to review this testimony as the case now stands and before this honorable court, always so ready and able to sieze the real points of the case, is quite unnecessary, must be our apology for not following plaintiff's counsel in their attempt to make something out of this, heretofore undreamed of, and now newly discovered point. There is nothing in it.

III.

But finally it is insisted that the court erred in refusing to instruct that "if the *treasurer* of defendant after knowledge of the alleged fraud, promised to pay the notes, if a proper power of attorney to transfer the stock was executed, there was a waiver of the fraud."

Now this was not refused (Folio 68-9.) but given with the qualification as there shown, that it would be true, if the

treasurer or officer had power to bind the company (the defendant), or was authorized to waive the fraud.

Does any one doubt this? Will counsel on the other side dare affirm that this is not the law? (We ask the court to look at the entire qualification.) If Wisner (the treasurer,) had no power to bind the company in this respect, then his act was valueless, amounted to nothing. If he had, then the court told the jury that there was a waiver, and if not, there was no waiver. If there is a plain proposition in law, morals, logic, or mathematics, that is one. And that is all there is of this part of the case. This treasurer was not a general agent. No pretense of this His powers were, of course, special and limited. This attempted waiver was in no manner connected with, nor did it grow out of, nor was it an act subordinate to or necessarily or properly connected with the principal act or his well defined, or principal duties. How was this matter of waiver connected with his duties as treasurer? or how did it enable him to carry into effect or discharge such duties? The statement of the proposition, the propounding of the inqury, is its own sufficient answer.

We submit the case.

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